AUG 20 1974

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-145

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN W. BEAL and ROBERT O. DUNN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD M. KATES
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Counsel for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

PAGE

OPINION BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I.

The Opinion Below Which Forbids Anyone, Including The District Court Clerk From Explaining The District Court Clerk's Docket Entries Is Such As To Call For An Exercise Of This Court's Power Of Supervision 5

II.

This Writ Should Be Granted To Resolve A Conflict Created By The Seventh Circuit With Decisions Of Other Circuits 6

CONCLUSION 6

APPENDIX

The Docket Entry in Question ..... App. 1

Affidavits and Certifications by the Clerk ..... App. 2-3

Opinion and Judgment of the U.S. Court of Appeals for the Seventh Circuit ..... App. 4

CITATIONS

Cases

Burke v. Commissioner of Internal Revenue, 301 F.2d 903 (C.A. 1) 6

Colvin v. Woods, 180 F.2d 893 (Second Case) (C.A. 8) 6

Neely v. Merchants Trust Co. of Red Bank, N.J., 110 F.2d 525 (C.A. 3), cert. denied, 311 U.S. 705 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN W. BEAL and ROBERT O. DUNN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Adron P. Brainerd respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 20, 1974 with a rehearing denied on June 19, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears at pages 4 through 6 of the Appendix which is attached hereto behind the petition. The opinion rendered by the District Court for the Northern District of Illinois, Eastern Division contains nothing related to this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on May 20, 1974 with rehearing denied on June 19, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Can a docket entry made by the clerk of the District Court be "impeached", or explained?

STATEMENT OF THE CASE

The case in the District Court dealt with questions relating to a bill of exchange under the Federal Banking Act. This petition does not concern the subject matter of the District Court decision. Instead, this petition involves a question regarding whether the appeal in the Seventh Circuit Court of Appeals was timely filed and that issue revolves around the docket entries by the clerk and whether the clerk is allowed by affidavit to explain, clarify or impeach his own docket entries.

The District Court Judge rendered his order on January 30, 1973. The order was transmitted to the clerk's office for entry in the docket. There is no question that the date of the clerk's physical entry of the order in the docket starts the thirty day period in which an appeal may be filed. The clerk's docket entry reflecting the judge's order appears in full on the bottom of page 1 of the Appendix. Its form is as follows:

Date	Proceedings	Date Order or Judgment Noted
1-30-73	. . . Order plaintiff's amended complaint is dismissed . . . Mailed Notices 2-1-73	(left blank)

The notice of appeal was filed on March 2, 1973. That filing would only be timely if the order was entered in the docket by the clerk on or after January 31, 1973. Months after the notice of appeal was filed opposing counsel filed a motion to dismiss on the grounds that the

appeal was not timely filed. Certifications from the District Court clerk's office were filed showing that under normal practices in that office the docketing took place at a time which would have made the filing of the notice of appeal timely. The Court of Appeals denied the motion to dismiss and denied a motion for reconsideration on that issue. Then after taking the case under advisement that court reversed itself and dismissed the case on the supposed ground that the notice of appeal was not timely filed and denied a rehearing. The Court of Appeals held that the "1-30-73" date on the docket entry governed though no date appeared under the heading "Date Order or Judgment Noted". Affidavits from the clerk which appear on pages 2 and 3 of the Appendix had been submitted to the Court of Appeals under court seal stating that the 1-30-73 date reflected only the date that the judge rendered his order and the 2-1-73 date of mailing also reflected the date that the order was entered in the docket which would have caused the notice of appeal to have been timely filed. However, the Court of Appeals refused to consider these certifications and affidavits on the ground that "the district court's docket cannot be impeached". The order dismissing the appeal was issued as an "unpublished order not to be cited per Circuit Court Rule" and then the court reversed itself because it felt its decision was important and it ordered it to be published.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW WHICH FORBIDS ANYONE INCLUDING THE DISTRICT COURT CLERK FROM EXPLAINING THE DISTRICT COURT CLERK'S DOCKET ENTRIES IS SUCH AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The foundation of the decision of the Court of Appeals in dismissing the appeal was that the District Court's docket entries cannot be "impeached" or explained even by the neutral clerk who made them. In this case the affidavits of the clerk at pages 2 and 3 of the Appendix show that the 1-30-73 date in the docket entry which was relied on by the Court of Appeals was the date the judge rendered his order, and not the date on which the docket entry was made and go on to show that under the clerk's procedures at that time, the appeal was timely filed. The Court of Appeals holds that the docket entries of the district court clerk are sacred and not subject to question or clarification. This Court in its supervisory capacity cannot tolerate a decision which holds that the facts of what occurred in the district court clerk's office are irrelevant since a mistake or ambiguity in the district court docket are sacrosanct and that ambiguity governs clarification. This Court cannot permit the record system under its supervision to subvert facts to fiction replacing justice with contrived blindness. A clerk of a court certainly should be permitted to clarify his records to let truth prevail. This Court in its supervisory function must not let this opinion by the Seventh Circuit stand. This Court should either summarily reverse that opinion or should grant this writ and permit argument of the merits.

II.

THIS WRIT SHOULD BE GRANTED TO RESOLVE A CONFLICT CREATED BY THE SEVENTH CIRCUIT WITH DECISIONS OF OTHER CIRCUITS.

The Seventh Circuit's decision conflicts with decisions of other circuits. The Third Circuit in *Neely* v. *Merchants Trust Co. of Red Bank, N.J.*, 110 F.2d 525 (1940), cert. denied 311 U.S. 705, permits the questioning, impeaching and clarification of a district court clerk's docket entries based on clerks' affidavits. The Ninth Circuit in *Colvin* v. *Woods*, 180 F.2d 893 (second case) at 894 (1950) permits the disregard of a date of entry of an order stated in the docket in favor of the date when the clerk actually made the entry. The First Circuit in *Burke* v. *Commissioner of Internal Revenue*, 301 F.2d 903 (1962) impeached a docket entry.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

RICHARD M. KATES
33 N. LaSalle Street
Chicago, Illinois 60602

Counsel for Petitioner

APPENDIX

p. 1

DATE	PROCEEDINGS	Date Order or Judgment No.
11-30-72	Filed Notice of Motion and motion to file amended complaint	
11-30-72	Order leave to plaintiff to file instanter amended complaint. Defendants to answer or otherwise plead within 20 days. Order cause reset from December 6, 1972 to January 3, 1973 for report on status-Will, J.	
	Mailed notices 12-1-72 P	
11-30-72	Filed Amended Complaint P	
12-18-72	Filed Motion of Warren W. Beal and Robert O. Dunn to dismiss amended complaint and Exhibits P	
12-26-72	Filed Brief in support of defendants motion to dismiss amended complaint P	
1-3-73	Order cause continued to January 26, 1973 at 10:00 a.m. for report on status-Will, J.	
	Mailed notices 1-5-73 P	
1-5-73	Filed Answer of plaintiff to brief and motion of defendant to dismiss amended complaint P	
1-9-73	Filed Reply Brief in support of defendants motion to dismiss amended complaint P	
1-24-73	On Courts own motion order cause reset from January 26, 1973 to January 30, 1973 at 10:00 a.m. for report on status-Will, J.	
	Mailed notices 1-26-73 P	
1-30-73	Order defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed (Court's Memorandum opinion will be filed within short date)-Will,J. (JS6)	
	Mailed Notices 2-1-73 gs	

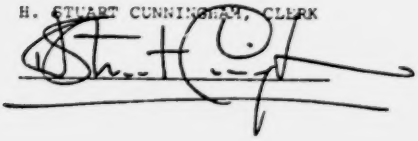
CERTIFICATION

UNITED STATES OF AMERICA)
) SS
NORTHERN DISTRICT OF ILLINOIS)

I, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the date entered into the left hand docket column of the docket sheet immediately adjacent to the item docketed indicates (a) in the case of an order, memorandum opinion or ruling of a judge, the date the judge signed such ruling, or (b) in the case of pleadings filed with the clerk, the date such pleadings were filed. The date the item was actually entered onto the docket, that is the physical typing of the entry, is generally the same as the date indicated on the docket for the mailing of notices.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 12th day of July, 1973.

H. STUART CUNNINGHAM, CLERK



UNITED STATES OF AMERICA)
; SS
NORTHERN DISTRICT OF ILLINOIS)

CERTIFICATE AND AFFIDAVIT

I, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois do hereby certify and swear that

1) The docket in the case Adron P. Brainerd -vs- Warren W. Beal, et al., Civil Action 72 C 1571 contains the following entry:

"1-30-73 Order Defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed (Court's memorandum opinion will be filed within short date) - Will, J. (JS6) Mailed notices 2-1-73 gs" ;

2) In accordance with the docketing procedures in effect in the Office of the Clerk at the time the date "1-30-73" represents the date on which the Honorable Hubert L. Will entered the order referred to in the docket;

3) In accordance with the docketing procedures in effect in the Office of the Clerk at the time the date indicated for the mailing of notices, i.e. 2-1-73, is the date on which the order was entered on the docket;

4) The practice of using the date of entry of an order by the judge as the date of entry of that order on the docket was one of long standing in the Office of the Clerk;

5) The present practice of the Office of the Clerk is to show on the docket the day an order is actually entered onto the docket regardless of the date it was entered by the judge.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 29th day of May 1974.

H. Stuart Cunningham

SWORN AND SUBSCRIBED before me this 29th day of May 1974.

In the
United States Court of Appeals
For the Seventh Circuit

No. 73-1382 September Term, 1973 January Session, 1974

ADRON P. BRAINERD,
Plaintiff-Appellant,
v.
WARREN W. BEAL and ROBERT O. DUNN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 C 1571
HUBERT L. WILL, *Judge.*

ARGUED FEBRUARY 11, 1974 — DECIDED MAY 20, 1974

Before SWYGERT, *Chief Judge*, KILEY, *Senior Circuit Judge*, and CUMMINGS, *Circuit Judge*.

PER CURIAM. Plaintiff Brainerd has appealed from a judgment dismissing his amended complaint for failure to state a claim upon which relief could be granted, and, in the alternative, because it was barred by the Illinois statute of limitations. We dismiss the appeal.

The complaint was based upon alleged violations by defendant bank officers of 18 U.S.C. §1005 through issuance of a cashier's check without authorization, and the making of false entries in bank records with intent to defraud. These violations would, if proved, render the

defendants individually liable for damages under 12 U.S.C. §503.[1]

The district court's judgment was rendered on January 30, 1973, and the docket sheet prepared by the clerk of the court lists entry of that judgment on January 30, 1973. The notice of appeal stated it was "from the order dismissing the amended complaint entered in this action on the 30th day of January, 1973." However, the notice was not filed until March 2, 1973, a date not within thirty days from January 30. Rule 4(a) Federal Rules of Appellate Procedure. We hold that Brainerd's notice of appeal was not timely filed and that we are therefore without jurisdiction to entertain the appeal. Rule 3(a) Federal Rules of Appellate Procedure: *Washington v. United States*, 450 F.2d 945 (3rd Cir. 1971); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609 (7th Cir. 1962).[2]

Brainerd misplaces his reliance upon unsworn affidavits signed by a deputy clerk of the district court stating that, based on "normal business practices," an entry dated January 30 would have been made on January 31 or February 1. The affidavits contradict the docket, as certified to us by the clerk of the court, which stated: "I, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify . . . that the documents submitted . . . are the original papers filed and *entered of record in my office on the dates designated in the List of Documents* . . . ." (Emphasis added.) Furthermore, the district court's docket cannot be impeached by affidavit. *Wall v. United*

[1] §503. Liability of directors and officers of member banks.
If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of this section or regulations of the board made under authority thereof, or any of the provisions of sections 217, 218, 219, 220, 655, 1005, 1014, 1906, or 1909 of Title 18, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violations. As amended Sept. 3, 1954, c. 1263, §28, 68 Stat. 1236.

[2] One judge of this panel, sitting as motion judge, twice denied, prior to oral argument, defendants' motions to dismiss the appeal as untimely filed. However, the court's ruling that it has jurisdiction is always subject to reconsideration.

States, 97 F.2d 672 (10th Cir. 1938), *cert. denied*, 305 U.S. 632 (1938). Accordingly, we disregard the affidavits since the practice of permitting an affidavit to change the docket date would create confusion in docketing of judgments.

Our holding may appear harsh; yet in *Washington v. United States, supra*, the notice of appeal was filed but one day late. Were we to entertain appeals whose notices were filed one day late, in the absence of circumstances warranting a relaxation of the rule,[3] there would be no rationale for not allowing appeals whose notices were filed two days or five days late. Mechanical rules "must be mechanically applied in order to avoid [the] uncertainties" that arise when exceptions are made. *United States v. Indrelunas*, 411 U.S. 216, 222 (1973).

APPEAL DISMISSED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[3] While Brainerd offers no excuse for late filing, he requests a remand for the district court to determine "whether any untimeliness was excusable. . . ." We refuse. *Evans v. Jones*, 366 F.2d 772 (4th Cir. 1966); and *Reed v. People of State of Michigan*, 398 F.2d 800 (6th Cir. 1968), cited by Brainerd, are inapposite, since in both of those cases the possible "excusable neglect" of appellants was apparent in the record.

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October Term, 1974

No. 74-145

ADRON P. BRAINERD,

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WARREN W. REAL and
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Respondents.

RESPONSE OPPOSING CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-145

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN W. BEAL and ROBERT O. DUNN,

Respondents.

RESPONSE OPPOSING CERTIORARI

QUESTIONS PRESENTED

1. Whether a petitioner may rely in his petition for certiorari on an affidavit never filed with the Court of Appeals, first called to that Court's attention in a petition for rehearing, and submitted to that Court without prior motion or leave of court.

2. Whether an unsworn "affidavit" about "general" practices of the clerk's office in entering judgments of record can impeach the unambiguous certification and docket entry of that same clerk's office as to the date of entry of record of a particular order in a particular case.

REASONS FOR DENYING WRIT

I.

THE KEY AFFIDAVIT ARGUED IN THE PETITION FOR CERTIORARI WAS NOT BEFORE THE COURT OF APPEALS.

As the face of the Petition shows, the Court of Appeals heard oral argument in this case on February 11, 1974 and rendered a decision on May 20, 1974. (Pet., App. p. 4.) The Petition also shows that it was only *after* that argument and decision that petitioner created the affidavit on which he now relies. (Pet., App. p. 3, showing date of May 29, 1974, as date of signature.) Petitioner never sought leave of the Court of Appeals to file that affidavit or to make any argument respecting it. The Court of Appeals never entered any order making the affidavit a part of the record on appeal. All that petitioner did after the May 20 decision was to file a petition for rehearing and attach to it the previously unseen May 29 affidavit. (Pet., App. p. 3.) All that the Court of Appeals did after first seeing the May 29 affidavit was to refuse (without comment) to rehear the case.

The Court of Appeals' discretionary decision not to rehear the case (or to consider the May 29 affidavit) is supported by the settled rule that:

> [Petitions for rehearing] are not for the purpose of presenting matters which should have been but, without good cause, were not argued before . . . and particularly they are not . . . to be used to introduce a record which was not even presented below. (Citations omitted.) (*Local No. 1505* v. *Local Lodge No. 1836*, 304 F.2d 365, 368 (1st Cir. 1962), *cert. granted*, 371 U.S. 908 (1962), *vacated as moot*, 372 U.S. 523 (1963).)

Accord, *Long* v. *District of Columbia*, 469 F.2d 927, 937 (D.C. Cir. 1972) ("It is, of course, within the discretion of

a court to ignore such claims [supporting jurisdiction] if they are not timely made."); *Lummus Company* v. *Commonwealth Oil Refining Co.*, 280 F.2d 915, 932 (1st Cir. 1960) ("If we have erred on the record before us, we would wish to reconsider. But we have no desire to consider a new record at this stage [rehearing]. The affidavits will not be received.").

Under Rule 60(b)(2), F.R.Civ.P., a party seeking to supplement a district court's record after the court has ruled must show that his new evidence "by due diligence could not have been discovered" previously. At least as strict a rule should apply in the Courts of Appeals. There will never be an end to an appeal if the losing party can unilaterally and without leave supplement the record on appeal after an appellate decision has been rendered and thereby force the court to consider the new matter presented. Here it is apparent that the May 29 affidavit could have been submitted before the decision was rendered on May 20. The Court of Appeals did not abuse its discretion in declining to rehear the case.

II.

THE COURT OF APPEALS PROPERLY HELD THAT THE CERTIFIED RECORD COULD NOT BE IMPEACHED BY UNSWORN AFFIDAVIT.

The record before the Seventh Circuit on May 20, 1974, clearly required dismissal of Brainerd's appeal. The clerk had certified that "the documents submitted . . . are the original papers filed and *entered of record* in my office *on the date designated in the List of Documents.*" (Emphasis added.) This official certification and List of Documents, which were before the Court of Appeals and relied on in its opinion, were omitted from the Petition. Accordingly they

are appended hereto as appendix pages A-1 to A-3. Item 41 on said List designates "1-30-73" as the only date associated with the order of dismissal. Likewise, the docket reprinted in part at Pet. 3 lists "1-30-73" as the one and only date relating to the order of dismissal. The dates January 31 and February 1 are nowhere used as dates of entry of record. Item 42 on the List (App. A-3, below) refers to "the order heretofore *entered* on January 30, 1973, dismissing plaintiff's amended complaint." (Emphasis added.)

The unsworn affidavit submitted by Brainerd with his reply brief only indicated that "generally" entry of judgment occurred at the time notices were mailed. (Pet., App. p. 2.) That statement was not inconsistent with the clerk's certification that in this particular case judgment was entered January 30. The "affidavit" nowhere states that this "general" practice was followed in this particular case.

More important, however, it would have been highly unfair for the Court of Appeals to allow the unsworn affidavit of Mr. Cunningham to vary the record. Defendant was not given an opportunity to depose Mr. Cunningham or otherwise undertake discovery concerning practices of the Clerk's office to see what "generally" means. Does it mean that 1%, 5% or 25% of entries are made on the date they purport to be made? Is there some way to determine which entries are made at the time designated? Does someone in the Clerk's office have a specific recollection as to this particular entry? Does Mr. Cunningham have personal knowledge of treatment of this case? Without such inquiries, the Court of Appeals could hardly have resolved a factual dispute even if the affidavit had created such a factual dispute, which it did not since it could have been interpreted as consistent with the certification.

These problems illustrate the unfairness and unworkability of any rule allowing the record on appeal to be varied by one party's affidavit on a disputed matter when the affidavit is first filed on the appellate level. Such problems have caused two Circuit Courts of Appeals to hold that the appellate record cannot be varied by affidavit. *Texas Co.* v. *American Trade Developing Co.*, 272 F. 670, 672 (5th Cir. 1921). *Wall* v. *United States*, 97 F.2d 672, 673 (10th Cir. 1938). At least two state cases applying the same rule have held in a case identical to this that a clerk's affidavit cannot be used to show that an appealable order was entered of record at a time different from that shown in the record. Notice of appeal was held not timely and the appeal was dismissed in both cases, the precise result reached in this case. *Sims* v. *McElhannon*, 113 S.E.2d 437 (Ga. 1960). *Barth* v. *Apache County*, 162 P. 62 (Ariz. 1917). See also *Burkett* v. *Burkett*, 245 S.W.2d 185 (Tenn. 1951).

The reason for the rule is demonstrated by the facts of this case. If the tendered affidavit were admissible, there would be no stability to the appellate record and docket. Every litigant would have to ask the Clerk personally whether "January 30" really meant "January 31," "February 1," or something else. This is obviously not a sensible system and not what is intended by the federal rules. *Danzig* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580, 582 (3d Cir. 1960) (federal rules contemplate definite date of final judgment appearing on face of record).

It is as fair to require an appellant to comply with the 30-day appeal rule as it is to require compliance with a statute of limitations. Here Brainerd's counsel knew that the judgment was entered January 30 (see his notice of appeal). He knew that the appellate rules required the no-

tice of appeal to be filed within 30 days of January 30. Rule 4(a), F.R.A.P. He knew that late filing of a notice of appeal affected the validity of the appeal. Rule 3(a), F.R.A.P. Thus, petitioner had only himself to blame for the fact that the Court of Appeals did not have jurisdiction of his case. (The Notice of Appeal is p. A-4 of the Appendix hereto.)

Moreover, petitioner has an inescapable dilemma. If no final judgment had been entered here on January 30, 1973, then the Notice of Appeal is insufficient. It only appeals "from the order dismissing the amended complaint *entered* in this action on the 30th day of January, 1973." (Emphasis added.) No attempt was ever made to amend this Notice of Appeal and no Notice of Appeal in the record refers to an order entered after January 30, 1973. Even if petitioner' affidavits were controlling (instead of irrelevant), they would only succeed in showing a different reason why this appeal should have been dismissed.

III.

CERTIORARI IS PARTICULARLY INAPPROPRIATE IN THIS CASE.

A. Mr. Brainerd Has Had His Days In Court.

Although the Court of Appeals dismissed Mr. Brainerd's appeal, he had already been given more than ample opportunity to argue the substantive merits of his case. He first filed the instant allegations in a state court suit in 1968. He litigated the case and lost it. On appeal, he also lost. *Brainerd* v. *First Lake County Nat. Bank, et al.*, 109 Ill. App.2d 251 (1969). He sued again in state court and again lost, this time on *res judicata* grounds. The dismissal of his case was affirmed on the same grounds. *Brainerd* v.

First Lake County Nat. Bank, et al., 1 Ill.App.3d 780 (1970). The opinions point out that, along the way, Mr. Brainerd also lost numerous unorthodox motions, including a "petition for mandamus against all of the judges of the Nineteenth Judicial Circuit." 109 Ill.App.2d at 258.

Having exhausted the state courts, Mr. Brainerd belatedly devised this suit under the federal banking laws. The District Court held that the suit did not state a federal claim and in any event was barred by the statute of limitations. This dismissal for untimeliness led to the instant untimely appeal.

Defendant has had to give Mr. Brainerd many days in court. It is not unfair to put a stop to this matter after three appellate opinions and three trial level dismissals.

B. The Situation In The Northern District Of Illinois Clerk's Office Has Changed.

The question presented by the Petition can have no bearing on any other party if, as petitioner's improper belated affidavit states (Pet. App. 3, ¶¶4-5), the challenged practice of the Clerk's office for the Northern District of Illinois has changed. According to petitioner, the certified List of Documents and docket will in future cases in that District Court use the date "an order is actually entered onto the docket" rather than "the date it was entered by the judge," as was allegedly done in this case. Mr. Brainerd's unique situation is thus unlikely ever to recur. Accordingly, this case does not call for the exercise of the Supreme Court's supervisory powers.

CONCLUSION

WHEREFORE, a writ of certiorari should not issue.

Respectfully submitted.

GARY M. ELDEN
200 E. Randolph Drive
Chicago, Illinois 60601
(312) 861-2192

Attorney for Respondents

APPENDIX

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS--SS

I, H. STUART CUNNINGHAM, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify to the United States Court of Appeals, for the Seventh Circuit, that the documents submitted herewith and annexed hereto are the original papers filed and entered of record in my office, on the dates designated in the List of Documents, and together with a true copy of docket entries as they appear in the official dockets in this office, constitute the Complete Record on Appeal in the cause entitled: ADRON BRAINERD vs. WARREN W. BEAL, et al., No. 72 C 1571.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 25th day of April, 1973.

H. STUART CUNNINGHAM, CLERK

By: /s/ Beverly V. Peters
Deputy Clerk

(Appendix)

Item No.

11-30-72—Filed Notice of Motion and motion to file amended complaint 32

11-30-72—Order leave to plaintiff to file instanter amended complaint. Defendants to answer or otherwise plead within 20 days. Order cause reset from December 6, 1972 to January 3, 1973 for report on status—Will, J. 33
Mailed notices 12-1-72 P

11-30-72—Filed Amended Complaint P 34

12-18-72—Filed Motion of Warren W. Beal and Robert O. Dunn to dismiss amended complaint and Exhibits P 35

12-26-72—Filed Brief in support of defendants motion to dismiss amended complaint P .. 36

1-3-73—Order cause continued to January 26, 1973 at 10:00 a.m. for report on status—Will. J. 37
Mailed notices 1-5-73 P

1-5-73—Filed Answer of plaintiff to brief and motion of defendant to dismiss amended complaint P 38

1-9-73—Filed Reply Brief in support of defendants motion to dismiss amended complaint P 39

1-24-73—On Courts own motion order cause reset from January 26, 1973 to January 30, 1973 at 10:00 a.m. for report on status—Will, J. 40
Mailed notices 1-26-73 P

1-30-73—Order defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed (Court's Memorandum opinion will be filed within short date)—Will, J. (JS6) 41
Mailed Notices 2-1-73 gs

2-12-73—Court this day files its memorandum opinion re order heretofore entered on January 30, 1973 dismissing plaintiff's amended complaint.—Will, J. (Draft) 42
Mailed Notices 2-13-73 (with copies of draft) gs

3-2-73—Filed Notice of Appeal by Plaintiff $5.00 pd. 43

4-12-73—Filed affidavit Richard M. Kates, pursuant to General Rule 39 as attorney for Plaintiff. 43A

4-23-73—Filed certified copy of order of USCA entered April 19, 1973. Order Time to file record on appeal extended for 15 days. P .. 44

4-23-73—Filed Request for complete record 45

(Appendix)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ADRON P. BRAINERD,
Plaintiff,

vs.

WARREN W. BEAL et al,
Defendants.

.72 C 1571

NOTICE OF APPEAL

(Filed March 2, 1973)

Notice is hereby given that Adron P. Brainerd, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order dismissing the amended complaint entered in this action on the 30th day of January, 1973.

/s/ Richard M. Kates
208 S. LaSalle St.
Chicago, Illinois

Attorney for Adron Brainerd

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-145

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN W. BEAL and ROBERT O. DUNN,

Respondents.

REPLY BRIEF ON A WRIT OF CERTIORARI

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Midwest Law Printing Co. Chicago 60601 Financial 6-2022

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The Response Opposing Certiorari raised many issues for the first time which were not raised in the Petition for a Writ of Certiorari.

The response states that the "key" affidavit (Pet. Appendix p. 3) was submitted on a motion for rehearing and therefore is entitled to no weight. That affidavit was for clarification purposes due to the decision of the Appeals Court although such clarification was not really necessary because of the earlier certification as to what occurred by the Clerk of the District Court which was presented prior respondents' submission of their brief to the Court of Appeals. (Pet. Appendix p. 2.) That certification showed that the date relied on by the Appeals Court and opposing counsel was the date the Judge rendered his opinion and that the date the docket entry was made, which started the 30-day appeal period, was such as to cause the filing of the appeal to be timely. Prior to the earlier certification shown in the appendix, there were also submitted to opposing counsel and made a part of Brainerd's appeal brief a certification by a deputy clerk that showed that the docketing date was such as to make the filing of the notice of appeal timely. Thus the affidavit submitted to the Appeals Court with the motion for rehearing represented no new grounds nor did it present new argument.

Respondent argues that the general form certification by one of the deputy clerk's which is routinely attached to all appeals is conclusive because it generally states that the filings were on the dates designated in the List of Documents. Yet the clerk's docket sheet which is photocopied on page 1 of the appendix of the Petition for a Writ of Certiorari shows no dates were even entered in the column which was to show the date of the entering of orders, and the Clerk of the District Court in specific affidavits and certifications states January 30, 1973 was not the date of the docket entry. The Clerk also explained that the word

"entered" as he used it referred to the date the Judge rendered his decision (Pet. Appendix p. 3).

Respondents repeatedly point out that the Clerk's statement on page 2 of the Appendix of the Petition for a Writ of Certiorari was an unsworn affidavit. That ignores the fact that it is a *certification* by the Clerk of the United States District Court under the seal of that Court which is not a nullity but rather is entitled to the weight of any affidavit.

Respondent asserts that he needs discovery regarding the clerk's clarification. First, what is submitted indicates to the contrary. Second, any generality is due to the fact that the respondent did not question the filing of the notice of appeal until over four months after it was filed. Third, the Clerk of the District Court and his deputies are not adversary parties and their office is open to all, so that if there was truth to respondent's contention that the Docket Entry was made on January 30, 1974 instead of later, respondent could have obtained his own affidavits without the necessity of any formal discovery. Also, this issue was obviously an issue arising in the Court of Appeals, not the District Court, though it should be noted that in his motion for rehearing and in other parts of the appellate procedure, Petitioner Brainerd suggested that if further clarification was necessary, the issue could be sent back to the District Court, but the Appeals Court never did that and indicated that the District Court Clerk simply could not contradict or clarify his docket.

Respondent cites cases from a few state courts which stand for the principle that a clerk cannot clarify his docket (presenting no on point federal cases) but the decisions of this type from 3 out of 51 states do not rule federal court procedure and federal practice.

Respondents assert that to permit the Clerk to correct or clarify his docket entries would ruin Appellate procedure by taking away all stability. That is a baseless assertion. Further this Court should want such clarifications or corrections from the courts it supervises. As was stated at p. 582 in *Danzing* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3rd Cir. 1960) erroneously cited by Respondents as supporting their position, "It would be unfair entrapment of a party to require him to understand and treat as . . . (one type of docket entry) an entry which was not so intended and did not so appear."

Respondent next claims that because Brainerd on his notice of appeal used the date the judge entered his order (as the Clerk also used the word entered for the judges act) it shows knowledge that the docket entry was made on January 30, 1973. That argument raised for the first time is shocking and has no basis in fact as is shown by the Clerk's certifications that the docket entry was made at a later date causing the filing of the notice of appeal to be timely. The use of the date the Judge rendered his opinion on the notice of appeal did not prejudice Respondents who knew what was appealed and fully briefed the appeal on its merits and such usage does not cause the appeal to be invalid. *United States* v. *Arizona, et al.*, 346 U.S. 907 (1951), *State Farm Mutual Auto Insurance Co.* v. *Palmer*, 350 U.S. 944; *Forman* v. *Davis*, 371 U.S. 178 (1962) at 181-2. It should be noted that the first two of the cases just cited were per curiam decisions granting the writ of certiorari, and with that grant, reversing the judgment below which is a fitting procedure for this case.

Respondents also argue that Brainerd has had his day in court already. That argument was made below and was

never accepted by the District Court. Further, since a different cause of action is involved, it is an invalid argument. *Cromwell* v. *County of Sac*, 94 U.S. 351 at 356, *Woodbury* v. *Porter*, 158 F.2d 194 (8th Cir. 1946).

Lastly, Respondents argue that the Petition for the Writ should not be granted because the clerk's practice has changed and now he clearly reflects the date of his entries on the docket in the proper place. However, that practice is not the question, the question is the general principle by the Court of Appeals that the clerk is not permitted to impeach, clarify or explain his docket entry which is a principle of general application in the decision which was printed as being important and which in its holding actually subverts truth, is in conflict with other circuits and calls for an exercise of this court's power of supervision to strike it as precedent.

Respectfully submitted,

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JAN 6 1975

MICHAEL RODAK, JR., CLERK

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PETITION FOR REHEARING

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PETITION FOR REHEARING

There is in this case the very important issue of redress for the clear negligence of the Clerk of the United States District Court. The actual docketing date of the final order is the sole issue in this case. The problem arose because that clerk's office failed to do a nondiscretionary duty under Rule 79(a) of the Federal Rules of Civil Procedure by not showing the date on which the docket entry was made which started the thirty day period for filing the notice of appeal. A copy

of the docket sheet is photocopied on page 1 of the Appendix of Brainerd's Petition for the Writ and shows that the column titled "date order or judgement noted" is blank. The failure of the clerk to do this nondiscretionary duty which caused the harm is clearly negligence.

The issue in this case was raised several months after the notice of appeal was filed. The district court clerk then tried to correct the problem in good faith, but the Court of Appeals prohibited him from doing so. When a ministerial employee in the federal judicial branch commits negligence, this Court should use its supervisory power to permit corrective action rather than refusing such relief and thus permitting such negligence by a federal court employee to deprive a litigant of all of his remedies and rights.

There is also possibly one mechanical matter. Brainerd respectfully hopes that his printers use of similarly colored covers (white and ivory) on his petition for certiorari and his reply did not inadvertently prevent consideration of both of his briefs.

Respectfully submitted,

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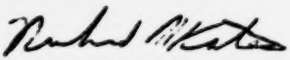
Counsel for Petitioner

CERTIFICATE

I, Richard M. Kates, counsel for petitioner, certify that this petition for rehearing is presented in good faith and not for delay.



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